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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/581,380	06/01/2006	Robertus Martinus M. Diks	F7743(V)	3881
201 7590 07/29/2010 UNILEVER PATENT GROUP 800 SYLVAN AVENUE AG West S. Wing ENGLEWOOD CLIFFS, NJ 07632-3100				
EXAMINER SMITH, PRESTON				
ART UNIT		PAPER NUMBER		
1782				
NOTIFICATION DATE		DELIVERY MODE		
07/20/2010		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary

Application No.

10/581,380

Applicant(s)

DIKS ET AL.

Examiner

PRESTON SMITH

Art Unit

1782

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 July 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5, 8 and 11-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5, 8 and 11-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/GS/US)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 07/12/2010 has been entered.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 12 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is not clear if applicant intends to claim 25°C or 250 C.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5,7-8, 11-13 rejected under 35 U.S.C. 102(b) as being clearly anticipated by Auriou, WO 02/065859 as evidenced by

TheInfluenceofRawandSterilizedMilkNPL and Technology of dairy products NPL.

Regarding claims 1, 4-5,7, 12-13, Auriou teaches preparing an emulsified product (dispersion or suspension (page 12, 3rd paragraph)) comprising phytosterol dispersed in an aqueous phase, which comprises mixing particulate phytosterol with an aqueous phase, adding a non-sterol emulsifier having an HLB value of at least 7 to the aqueous phase and/or to a fat phase, and mixing the ingredients together with the aqueous phase and the fat phase to form an emulsion (page 3, 4th paragraph). The aqueous phase is preferably maintained at a temperature of between 60-100 C (for at least 5 minutes to 2 hours) and stirred until the phytosterol is evenly dispersed and milk protein may be added (page 12, 3rd paragraph) however it is important to maintain a temperature of 80 C or higher during dissolution of phytosterols in order to avoid recrystallization of the phytosterols (see page 2, 2nd paragraph of Auriou) . Common sterilization temperatures and times of similar “milky” compositions fall within the range of Auriou as evidenced by

TheInfluenceofRawandSterilizedMilkNPL and Technology of dairy products NPL.

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Aurio is thus considered to teach a "sterilized" product embodiment since sterilization would occur at temperatures of 100 C and times of 30 minutes as evidenced by the references). The resulting product is "milky" (page 12, 3rd paragraph of Auriou). Monoglycerides may be used as an emulsifier (page 13, 3rd paragraph). The amount of non-sterol emulsifier may be between 0.01 -1% by weight in the final product (page 8, 4th paragraph). POE fatty esters may also be added to the product (page 10, 3rd paragraph). Since the composition has all of the same features as applicant's, it would not show any age gelation after 8 weeks of storage at 20-25 C.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 2-3, 8, and 11 rejected under 35 U.S.C. 103(a) as being unpatentable over Auriou, WO 02/065859 as evidenced by TheInfluenceofRawandSterilizedMilkNPL and Technology of dairy products NPL.

Regarding claims 2-3, Auriou teaches a product made by a very similar method as the embodiment discussed previously wherein the product has a Milk protein content of 0.9 wt% in Table 1 on page 16.

Auriou fails to teach the wt% of milk protein in the described method embodiment of the invention however.

It would have however been obvious to one having ordinary skill in the art at the time of the invention to maintain the milk protein content close to 0.9% in order to maintain the integrity of the invention of Auriou and produce a product with the properties desired by the invention of Auriou. Since producing a product with a similar milk protein amount would have been obvious, it is considered that applicant's claimed range of 0.5-10wt% would have been obvious in light of Auriou.

Regarding claim 8, there is no clear teaching in Auriou pertaining to the amount of fat in the emulsion of the described embodiment however Auriou does in fact teach that the amount of fats would vary depending on the type of product desired (page 9, 3rd paragraph). Fats in low fat salad dressings may be from 0-10% (page 9, 3rd paragraph). In light of this teaching of Auriou, if one of ordinary

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skill in the art desired to produce a low fat salad dressing (or food product) product, one of ordinary skill in the art at the time of the invention would have found it obvious to look to this teaching of Auriou and maintain the fat content from 0-10%. In light of Auriou, it is thus considered that the claimed fat range of 0.1 to wt% would have been obvious.

Regarding claim 11, the amount of emulsion stabilizer/thickener that may be included in the composition may be in the range of 0-30% by weight of the composition depending on the desired consistency of the end product (see page 11, last paragraph). In light of this range, one of ordinary skill would have found applicant's claimed range obvious and discoverable through routine experimentation in an attempt to obtain a desired consistency.

Response to Arguments

Applicant's arguments filed 07/12/2010 have been fully considered but they are not persuasive.

Applicant argues on page 4, 2nd paragraph that Goto says nothing about storing the product. Claim 12 only states that the product would not show any age gelation after 8 weeks of storage at 20-25C. A method step of "storing" does not appear to be claimed. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies are not recited in the rejected claim(s).

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Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Additionally, the Goto reference was only used to teach a sterilization step.

Applicant argues on page 4 (and top of page 5) that since the composition of claim 1 includes some of the same ingredients as applicant's example 1, example 1 is representative of the subject matter of claim 1 and the office should reconsider applicant's unexpected results. Claim 1 is much broader than example 1 and thus can be reproduced in a manner that is much different than example 1 and yield completely different results than example 1.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PRESTON SMITH whose telephone number is (571)270-7084. The examiner can normally be reached on Mon-Th 6:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on (571)272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/
Primary Examiner, Art Unit 1782

prs